FILE COPY

Office-Supreme Court, U.S.
FILED
APR 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1368~~ 1386

DONALD J. MILLER,

Petitioner,

—v.—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON AND CURTIS, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL G. CHEVIGNY
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DONALD J. MILLER
165 Christopher Street
New York, New York

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes 3

Statement of the Case 4

REASONS FOR GRANTING THE WRIT

I. The case raises important issues of wide application 6

II. The decision below should be reviewed, because it is inconsistent with principles established in rulings of this Court 7

A. Right of Privacy and the Fourth Amendment 7

1. Return of Fingerprint Records 11

2. Restriction of the Class to Be Fingerprinted 12

3. Showing of Need 15

B. Denial of Equal Protection of the Laws 15

C. Due Process of Law 16

D. Requirement of a Three-Judge Court 19

CONCLUSION 21

PAGE

APPENDIX

Opinion of Court of Appeals 23

Opinion of District Court 27

Relevant Statutes 48

TABLE OF AUTHORITIES

Cases:

Camara v. Municipal Court, 387 U.S. 523 (1967) 10, 11, 13, 15, 17

Davis v. Mississippi, 394 U.S. 721 (1969) 8, 9, 10, 11, 13, 17, 19

Ex Parte Poresky, 290 U.S. 30 (1933) 19

Friedman v. Valentine, 30 N.Y.S.2d 899 (Sup. Ct. 1941), aff'd 266 App. Div. 561, 42 N.Y.S.2d 593 (1943) 15

Greene v. McElroy, 360 U.S. 474 (1969) 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 17

IAM v. Street, 367 U.S. 740 (1961) 17

James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969) 10, 11, 17

NAACP v. Alabama, 357 U.S. 449 (1958) 17

Olmstead v. United States, 277 U.S. 438 (1927) 7

Parker v. Lester, 227 F.2d 708 (9 Cir. 1955) 15

BLEED THROUGH POOR COPY

PAGE

Stanley v. Georgia, 394 U.S. 557 (1969) 7

Thom et al. v. N.Y.S.E. et al., 69 Civ. 4092 (S.D.N.Y.) 4

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 16

Constitutional Provisions:

United States Constitution

First Amendment 17

Fourth Amendment 2, 7, 8, 10, 11, 17

Fourteenth Amendment 2, 16

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §2280 et seq. 4, 19

42 U.S.C. §1983 4

New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N. Y. Supp. §940 et seq. 3, 4, 11, 16

New York Executive Law, Article 21, 18 McKinney's Consol. Laws of N. Y. Supp. §600 et seq. 5, 14

New York State Civil Rights Law, 8 McKinney's Consol. Laws of N. Y. Supp. §79-e 3, 4, 11, 16

New York State Labor Law, 30 McKinney's Consol. Laws of N. Y. §201-a 3, 4, 7, 15, 16

New York State Laws of 1969, Chaper 1071, 19 McKinney's Consol. Laws of N.Y. Supp. §359-e(12) ....*passim*

COPY BOUND CLOSE IN CENTER

PAGE

Other Authorities:

American Civil Liberties Union, "Thumbs Down" (pamphlet, 1938) 7

Cole, "Arrest Records on Wall St. Found," *New York Times*, 2/5/70, p. 1, col. 2 .....6, 13

Ernst, Morris, "Should We Have Universal Fingerprinting?—A Threat to Personal Liberty," 100 *Forum* 173 (1938) 7

Fried, "Privacy," 77 Yale L.J. 475 (1968) 7

Governor's Message, 2 McKinney's 1969 Sess. Laws of N. Y. 2575 .....5, 6, 13

Morgenthau, Robert M., Remarks at Security Control Conference at New York Hilton, 11/25/69 at 15 18

New York State Identification and Intelligence System, "Crime 68: The NYSIIS Response" 19 14

Wall Street Journal, 2/5/70, p. 17 .....12, 13

Westin, *Privacy and Freedom* 372 (1967) 16, 17

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

DONALD J. MILLER,

Petitioner,

—v.—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON AND CURTIS, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Donald J. Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 2, 1970.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, *infra,* pp. 23-26. The opinion of the District Court for the Southern District of New York, reported in 306 F. Supp. at 1002, also appears in the Appendix, *infra,* pp. 27-49.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 2, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a state statute which provides, without restriction, for fingerprinting all persons in an industry as a condition of employment, violates the right of privacy, the Fourth Amendment, and due process of law.

2. Whether a state statute which provides without restriction for fingerprinting all persons in an industry as a condition of employment, when state law provides narrowly drawn protections for fingerprinting in other cases, violates the Equal Protection Clause of the Fourteenth Amendment.

3. Whether a three-judge court should be convened to determine the constitutionality of a state statute which provides without restriction for fingerprinting all employees in an industry, as a condition of employment.

Constitutional Provisions and Statutes

Chapter 1071 of the New York State Laws of 1969, 19 McKinney's Consol. Laws of N.Y. Supp. §359-e(12), provides:

> "All persons including partners, officers, directors and salesmen employed by a member or a member organization of a National Security Exchange, registered with the federal securities exchange commission and any employee of a clearing corporation affiliated with any such registered National Security Exchange employed on or after September first, nineteen hundred sixty-nine, who are regularly employed within the state of New York shall, as a condition of employment, be fingerprinted. Every set of fingerprints taken pursuant to this subdivision shall be promptly submitted to the attorney general for appropriate processing."

The following statutes are set forth in the Appendix, *infra*, pp. 48-50:

New York State Labor Law, 30 McKinney's Consol. Laws of N.Y. §201-a

New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N.Y. Supp. §944

New York State Civil Rights Law, 8 McKinney's Consol. Laws of N.Y. Supp. §79-e

Statement of the Case

The present action[1] was brought in the District Court for the Southern District of New York by Donald J. Miller, a lawyer then employed by the defendant Paine, Webber, Jackson and Curtis, a firm associated with the National Security Exchanges, including the defendants American and New York Stock Exchanges. The case is a civil rights action under 42 U.S.C. §1983 for declaratory and injunctive relief against the operation of Chapter 1071 of the New York State Laws of 1969 (19 McKinney's Consol. Laws of N.Y. §359-e(12) (1969), hereinafter referred to as "Chapter 1071"), which is set out above. The plaintiffs in this and the companion case brought on motions to convene a three-judge court pursuant to 28 U.S.C. §2280 *et seq.* for the purpose of declaring the statute unconstitutional as an invasion of privacy, an unlawful search and seizure, a denial of due process of law, and a denial of equal protection of the laws.[2] Temporary restraining orders against the dismissal of the plaintiffs were entered pending the hearing of the motions. The defendants opposed those motions, and made cross motions to dismiss (App. p. 30).

Chapter 1071 required the fingerprinting of all employees in the securities business, new and old alike. Defendants claimed that "in excess of" 50,000 persons were employed

---

[1] The companion case, *Thom et al.* v. *N.Y.S.E. et al.*, 69 Civ. 4092 (S.D.N.Y.) presented the same issues in the District Court but has not been appealed.

[2] At all times relevant to this case, state law forbade the fingerprinting of private employees generally as a condition of employment, N.Y. State Labor Law §201-a, App. p. 50, and provided for the return of fingerprints seized in connection with an arrest, when the defendant is acquitted. N.Y. Code of Criminal Procedure §944 and Civil Rights Law §79-e, App. pp. 48-49.

by firms affiliated with the National Securities exchanges, and that five to six thousand new employees would be fingerprinted each year (App. p. 31) (as it developed, both figures were much larger than these estimates). It was undisputed that Chapter 1071 provides no machinery for the return of the fingerprints, for the limitation of the class of persons to be printed or for alternative means of ascertaining good character. It was further undisputed that, as a matter of law, the fingerprints were to be processed by the New York State Identification and Intelligence System[3] and then to be retained by the state.

Defendants claimed, and the District Court relied upon an especial necessity to test the probity of employees in the securities industry, pointing in particular to an increasing problem of "lost or stolen" securities (App. pp. 31, 34). The Governor's message in support of the bill stated its purposes to be to "combat the infiltration of the securities industry by organized crime and reduce the incidence of securities thefts" (Governor's Message, 2 McKinney's 1969 Sess. Laws of N.Y. 2575, App. p. 33).

On November 18, 1969, the plaintiffs' motions in this and the companion case were denied by the Hon. Edward Weinfeld, the temporary restraining orders were vacated, and the motions to dismiss were granted (App. p. 45). On November 21, 1969, the petitioner Donald J. Miller was dismissed from his employment by the defendant Paine, Webber, Jackson and Curtis for bringing the present action (App. p. 26), and a stay of that dismissal was denied in the District and Circuit Courts. Mr. Miller immediately

[3] Established pursuant to Article 21 of the New York Executive Law, 18 McKinney's Consol. Laws of N.Y. Supp., §600 *et seq.*

appealed, but the plaintiffs in the companion case did not. The Second Circuit affirmed the District Court without further discussion of the issues.

REASONS FOR GRANTING THE WRIT

I.

The case raises important issues of wide application.

Governor Rockefeller, in his message approving Chapter 1071, estimated that 50,000 employees would be affected by it, together with an estimated 10,000 new employees each year. 2 *McKinney's 1969 Sess. Laws of N.Y.* 2575, 2576; App. p. 31. Subsequently, the defendants, the Attorney General of New York, and the New York Stock Exchange announced the results of the law revealing that the number of persons fingerprinted in fact has been and will be much higher. Cole, "Arrest Records on Wall St. Found," *New York Times,* 2/5/70, p. 1, col. 2. Some 86,000 persons had already been fingerprinted at that time, more were expected, and an influx of 50,000 *new* prints, due to employee turnover, is expected each year. Even these figures do not describe the full range of the statute at issue here, and of the case at bar, because there are other fingerprinting laws, both in New York and other states, for employment as well as other purposes, which may be affected (see e.g., appendix to District Court opinion, App. p. 46). Moreover, the notoriety of the present statute will no doubt encourage the proposal of similar statutes for other industries and in other states.

The threat of such mass fingerprinting statutes has been a matter of public controversy for a great many years. In

the 1930's, there was a drive for universal fingerprinting, which provoked opposition, See American Civil Liberties Union, "Thumbs Down" (pamphlet, 1938), Morris Ernst, "Should We Have Universal Fingerprinting?—A Threat to Personal Liberty," 100 *Forum* 173 (1938). New York State's Labor Law §201-a (App. p. 50), to which Chapter 1071 is an exception, was passed to protect working people from discriminatory fingerprinting. The present case thus presents important issues of policy of long standing, which may ultimately affect many thousands of working people. They should be decided now by this Court, if they are not to be decided by default by industry and technology.

II.

The decision below should be reviewed, because it is inconsistent with principles established in rulings of this Court.

A. *Right of Privacy and the Fourth Amendment*

The right of privacy involved here may be defined broadly as "the right to be let alone—the most comprehensive of rights and, the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Brandeis, *J.*, dissenting, *Olmstead* v. *United States,* 277 U.S. 438, 478 (1927), cited with approval, *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969). The legal framework of protection for this right has been called by one scholar: "that aspect of social order by which persons control access to information about themselves." Fried, "Privacy," 77 *Yale L.J.* 475, 493 (1968). The courts

below have denied that there is any problem of privacy. But a law which compels the indiscriminate fingerprinting of more than 50,000 persons in a major industry, when that population is expected to change at a rate greatly in excess of 10,000 a year without providing any machinery for the return of those fingerprints, presents a substantial constitutional issue.

In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), this Court set forth the outlines of a rule protecting the right of privacy in fingerprints consistent with the provisions of the Fourth Amendment. Justice Warren, speaking for a unanimous Court, said, 394 U.S. at 726-728 (emphasis added):

> Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19, 20 L.Ed.2d 889, 904, 88 S.Ct. 1868 (1968), when we rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"
>
> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that because of the unique nature of the fingerprinting process, such detentions might, under *narrowly defined circumstances* be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967). De-

BLEED THROUGH POOR COPY

tention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts which marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment . . .

In the present case, the District Judge, in words approved by the Court of Appeals, maintained that *Davis* was inapplicable to the statute at issue here. In *Davis*, the petitioner had been picked up with other youths and fingerprinted, in

an ultimately successful effort to find fingerprints which matched those at the scene of a crime. The doctrine of the case, the District Court here said " . . . is but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person, no matter what the scope or duration" (App. p. 38). That statement, it is submitted, is precisely correct, and should lead to the conclusion that *Davis* is applicable to this case. The Fourth Amendment strictures on searches and seizures of persons or premises are but one aspect of the law of privacy, and they are not limited to a criminal context. See *James* v. *Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), appeal docketed in this Court, No. 977 (home visits to welfare recipients).

The citation of *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) by this Court in *Davis* in connection with fingerprinting is significant. *Camara* dealt with searches of premises without warrants, for the purpose of detecting Housing Code violations. Although the Court held that a strict adherence to case-by-case probable cause may not be required for administrative inspections, it was also held essential that narrowly drawn standards be provided for the grounds upon which a search is made. Taken together, *Camara* and *Davis* stand for the principle that fingerprinting may not be required upon a dragnet basis, but only upon narrow standards which protect the privacy of those whose fingerprints are taken. Chapter 1071 supplies no standards whatever; it provides for the fingerprinting of every person in the securities business, regardless of the circumstances, and for his dismissal upon his refusal to comply.

Petitioner's position is thus supported by the decisions of this and other Courts providing for a flexible application

BLEED THROUGH POOR COPY

of Fourth Amendment rights in a non-criminal context. Those decisions indicate that if a statute poaches upon an area of privacy protected by the Fourth Amendment, it must be narrowly drawn so as to afford the maximum protection of the person consistent with the state interest. *Camara* v. *Municipal Court, supra; James* v. *Goldberg, supra. Davis* v. *Mississippi, supra,* in particular, holds that, with narrowly drawn exceptions, there is a Fourth Amendment right to be free from compulsory fingerprinting. The required constitutional effort to draw such standards has not even been attempted in the drafting of Chapter 1071, although the nature of at least some of those standards can easily be seen. Consistent with the interests of the state, the law could have, and should have, provided for the return of fingerprints after they are checked against the records, for the limitation of the fingerprint check to a class smaller than all employees associated with any stock exchange firm, and for an opportunity for the individual who objects to being fingerprinted to show that there is no need for his prints. Let us consider each of these at somewhat greater length.

1. Return of Fingerprint Records

Chapter 1071 does not supply even the minimum protections afforded under New York State law for those properly accused, upon probable cause, of a crime. Although the Code of Criminal Procedure provides for the fingerprinting of such persons upon arrest (66 McKinney's Consol. Laws of N.Y., Supp. §940), both the Code (*Id.* at §944) and the State Civil Rights Law (8 McKinney's Consol. Laws of N.Y., Supp., §79-e) App. p. 48 provide for the return of the fingerprint records upon acquittal. There is nothing in Chapter 1071 which provides for the

return of the fingerprints of any employee.[4] If the real purpose of Chapter 1071 were to identify persons with criminal records who apply for jobs, the logical thing for the legislature to have done would have been to provide for the return of the fingerprints whenever no criminal record was found. The failure to do so, in the framework of existing New York State laws (as will be more fully discussed below), implies a broader purpose than the identification of job applicants who have criminal records. It implies that the fingerprint file is to be continuously maintained, so that evidence can be obtained against persons, so that supposed "undesirables" of whatever sort, criminal or otherwise can be excluded from the industry, and so that a general atmosphere of surveillance will prevail.

The District Court branded these points of distinction as "frivolous" and "conjectural," upon the ground that no proof of such improper usages had been made, and that in any case to use the fingerprints for future investigation would be only an "incidental future by-product" (App. p. 43). This holding is bottomed on the erroneous assumption that there is no right of privacy in fingerprints.

2. Restriction of the Class to Be Fingerprinted

Chapter 1071 extends to every employee in the securities business, regardless who he is or what he does. This drag-

---

[4] Petitioner does not concede that the protections afforded the accused under New York's criminal procedure are adequate. They should provide for *automatic* return of fingerprints upon acquittal instead of for return upon application. Too many defendants do not know that their prints can be returned, if there is no conviction, and thus many prints for arrest only remain in the files. Of those dismissed after the massive fingerprinting under the statute at issue here, half had not been convicted. *Wall Street Journal*, 2/5/70, p. 17.

net aspect of the law contradicts the holding in *Davis* v. *Mississippi*, 394 U.S. at 727, that fingerprinting must be confined to "narrowly defined circumstances," and the holding in *Camara* v. *Municipal Court, supra* that searches may not be made, even for non-criminal purposes, unless they are restricted to a class definably within the purposes of the statute. Here, the fingerprinting should be restricted, at the very least, to those upon whom suspicion might reasonably be expected to fall if securities are missing. This might include only those who actually work with the physical shares themselves.[5]

The evils of the dragnet provisions of the statute, in intruding upon privacy without connection to a protectible state interest, are already apparent after six months of the administration of Chapter 1071. If the purpose of the statute, as stated in the Governor's message, 2 McKinney's 1969 Sess. Laws of N.Y. 2575, was to "combat the infiltration of the securities industry by organized crime and to reduce the incidence of securities thefts," its effects so far have been wide of the mark. It has resulted in the dismissal of a few hundred employees whose fingerprint records yielded information upon assorted charges, including sex offenses. Half of them had not even been convicted, but merely arrested in the past (*New York Times*, 2/5/70, p. 1; *Wall Street Journal*, 2/5/70, p. 17). This is typical of the evils inherent in a dragnet system: it damages the lives of many, while contributing nothing to the solution of the crime problem.

---

[5] For example, the printing could have been restricted to "back office" employees who handle trades of securities. App. p. 31. It is likely, as petitioner pointed out in his affidavit that it is possible to make automated "book exchanges" of securities which entirely eliminate the back office problem. App. p. 41.

The problem of surveillance over the backgrounds of employees is exacerbated by the activities of the New York State Identification and Intelligence System (NYSIIS), which, pursuant to Article 21 of the state's Executive Law (18 McKinney's Consol. Laws of N.Y. Supp. §600 *et seq.*), carries out the "appropriate processing" of the fingerprints for the Attorney General under Chapter 1071. According to reports published by the state pursuant to §607 of the Executive Law, 18 McKinney's Consol. Laws of N.Y. Supp. §607, general "intelligence" information, in addition to the naked record of arrests and convictions, is being programmed into the NYSIIS system. The most recent annual report to the Governor, "Crime 68: The NYSIIS Response" at 19, notes a "pilot study," "which included the collection of organized crime intelligence data concerning some 200 individuals of statewide interest, suspected of being involved in organized crime." The report continues at 20:

> Thus the system design, which was finalized in 1968, had provided for strategic assessments and statewide estimates and evaluations: to support and give informational and technical assistance to the efforts of action agencies; and, at the same time, provide logistic assistance to a State organized crime prevention council, as defined in and contemplated by the Omnibus Crime Control and Safe Streets Act of 1968.

Thus any sort of "character" information about employees can be made available to employers; it is but a step from reporting suspicions of "organized" crime to reporting political or other character history. However useful such information may sometimes be, in appropriate cases, access must be strictly limited. The surveillance powers of NYIIS

are limited only by the capacity of its staff and computers, and such powers must be restricted by the narrowest possible application.

3. Showing of Need

It has been repeatedly held that, when governmental security measures interfere with the rights of privacy of an employee, the latter must be afforded the protections of due process. *Parker* v. *Lester,* 227 F.2d 708 (9 Cir. 1955); *Greene* v. *McElroy,* 360 U.S. 474 (1969). Here, for example, the statute might have provided for a hearing board to determine whether those employees who object to being fingerprinted may actually be able to make a showing that there is no need to take their prints, or that in fact there are alternative modes of establishing good character. Such a scheme has been proposed, *Camara* v. *Municipal Court,* 387 U.S. at 539, in the analogous situation where health inspectors seek to enter a home, and the tenant objects; for such cases a modified warrant-system may be established. Here, a hearing system to judge individual objectors was surely not too onerous.

B. *Denial of Equal Protection of the Laws*

New York has recognized the right of privacy in fingerprints in two major ways. First, Section 201-a of the Labor Law, 30 McKinney's Consol. Laws of N.Y. §201-a, App. p. 52, to which the present statute is an exception, forbids the fingerprinting of private employees as a condition of employment.[6] Second, New York statutes which provide

[6] A New York court has said that the purpose of this statute was in fact to forestall a system of surveillance, by preventing blacklisting of labor organizers. *Friedman* v. *Valentine,* 30 N.Y.S.2d 899 (Sup. Ct. 1941), aff'd 266 App. Div. 561, 42 N.Y.S. 2d 593 (1943).

for the fingerprinting of persons lawfully arrested (New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N.Y. §940 *et seq.*) also carefully provide for the return of those prints if the defendant is acquitted. *Id.* at §944; New York State Civil Rights Law, McKinney's Consol. Laws of N.Y. §79-e, App. p. 48.

The court below, ignoring these statutes, dubbed the equal protection argument "patently frivolous" (App. p. 45). In fact, however, the discrimination against securities employees is totally invidious and irrational. There is no showing that theft is more widespread in the securities business than in any other; the problem affects industry generally.[7] Westin, *Privacy and Freedom* 372 (1967). Moreover, even if there were a reason to exclude all securities employees from the protections of Labor Law §201-a, there is no excuse for affording them fewer protections than even those minimal provisions for return given to persons lawfully arrested. The present law affords less protection to a man employed by the securities industry than to one fairly accused, upon probable cause, of a crime. Cf. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

C. *Due Process of Law*

The court below (App. p. 42) relied upon the police power of the state to justify Chapter 1071. That holding can be supported only if there is no constitutional protection for one's fingerprints (as the court below ruled). It has been repeatedly held that when a state law affects personal rights protected under the Fourteenth Amendment, it must be narrowly drawn so as to cover *only* the

[7] The figures of losses given by defendants are only of securities "lost or stolen." App. p. 31.

interests of the state. In the First Amendment area, such cases are numerous, e.g. *NAACP* v. *Alabama,* 357 U.S. 449 (1958) (foreign corporation regulation applied to infringe freedom of association), but the rule is applied also to rights of privacy, *Griswold* v. *Connecticut,* 381 U.S. 479, 481-482 (1965), including those under the Fourth Amendment *James* v. *Goldberg, supra; Camara* v. *Municipal Court, supra; Davis* v. *Mississippi, supra.* The federal court must examine the state statute in such cases, to determine whether there is not some way the state can reach its goal, that is less restrictive of personal constitutional rights than the statute. While the power of government to control the conditions of labor is relatively broad, that power, as well, is subject to the rule. *IAM* v. *Street,* 367 U.S. 740 (1961). In his leading work, *Privacy and Freedom* 371 (1967), Alan Westin restated this rule for rights of privacy:

> In deciding whether there are alternative methods less violative of individual and organizational privacy than proposed surveillance devices and processes, *the burden of proof that other techniques are not available should be on those seeking authorization.* (Emphasis supplied.)

Thus the fact that Chapter 1071 creates an unreviewable system of surveillance for all employees and that prints are not returned is important, and it is no answer to say, as the court below said (App. p. 43) that plaintiff has not proved that the prints will be misused, or that some other use is merely a "by-product." Plaintiffs in *James* v. *Goldberg, supra,* were not obliged to show that welfare home visits were abused, nor in *Camara* that health

searches were abused. Where there is a right of privacy it is for the state to justify its infringement.

It appears, moreover, that the state's interest in taking the fingerprints is extremely meager. Chapter 1071 does not meet its stated purposes, according to Robert M. Morgenthau, formerly United States Attorney for the Southern District of New York and a leading law enforcement officer in this field. Mr. Morgenthau said (Remarks of Robert M. Morgenthau at Security Control Conference at New York Hilton, 11/25/69 at 15-16):

> Careful screening of job applicants is necessary, particularly where in the course of anticipated employment the applicant will have physical access to certificates. I understand that fingerprinting of applicants is becoming a standard practice with a view towards determining the existence of a criminal background.
>
> Let me insert a word of caution in this respect. None of the back-office employees convicted in our court had prior criminal records. A fingerprint check would not have denied them employment.
>
> Let me add this also. As a society we have committed ourselves to equal opportunity for all citizens. It is a matter of fact that many of those who have not had equal economic opportunity have at some youthful time violated the law and have thereby obtained a criminal record. It would be too bad, it seems to me, if a reliance upon a criminal record as a bar to employment served to deprive our disadvantaged of the chance to earn an honest living.
>
> Moreover, such a result would deprive the investment community of a pool of able and potentially able employees at a time when recruitment for clerical work

has become a major problem. We must remember our history and experience as a nation which teaches that the poor often are the most productive workers once given the opportunity to earn a decent wage.

Furthermore, the uncontradicted statement of the plaintiff (App. p. 41) outlined alternative methods of security which are probably less restrictive of the individual and actually more effective in attaining the purposes of the statute. It is no answer to say, as did the court below that the decision to institute these proposals "rests with the Legislature" (App. p. 42), because here there is a right of privacy, albeit qualified, and accordingly, the legislature is bound to draw a narrow statute.

D. *Requirement of a Three-Judge Court*

In deciding whether to convene a three-judge court to consider the constitutionality of a state statute under 28 U.S.C. §2280 *et seq.*, this court has said that a single judge should not dismiss the claim unless "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). The decisions of this Court plainly do not exclude Chapter 1071 from controversy; on the contrary *Davis* v. *Mississippi, supra* reopened the matter to controversy.

Apart from decisions of this court, it is clear that a number of questions raised by Chapter 1071 presented triable issues of fact, which should have been resolved by a hearing before a three-judge court.

1. The "appropriate processing" to which fingerprints are to be subjected under Chapter 1071 presents a triable issue as to the resulting surveillance over the lives of employees under applicable state laws, especially, as we have seen (*supra*, p. 14) when the prints are retained and the files of the State Identification and Intelligence System may contain undetermined "intelligence" information. This is a most serious matter, which cannot be dismissed out of hand.

2. There is a substantial question whether the restrictions on Chapter 1071 proposed by the petitioner would not serve the interests of defendants just as well as the present statute. There is reason to believe that limitation of the class to be printed, return of the prints, and alternative proof of character for objectors will suit those interests, and accordingly, a hearing should have been held to show that fact. When, as here, rights of privacy are involved the consideration of alternatives are essential to a determination as to the constitutionality of the act.

3. Equally relevant is the tenuous connection between fingerprinting and the act's stated purpose of preventing thefts of securities. Plaintiff claims, and was prevented from proving, that there are superior methods, less restrictive of privacy, for controlling the flow of securities. It is unlikely, furthermore, that the present act would weed out many, if any, swindlers and plaintiff should have an opportunity to prove it. The ill-conception of a statute may not ordinarily be of constitutional dimensions, but it clearly is so when rights of privacy are in the balance.

There are thus a number of issues relating to the constitutionality of Chapter 1071, for which it was essential that a three-judge court be convened.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

PAUL G. CHEVIGNY
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DONALD J. MILLER
165 Christopher Street
New York, New York

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner